Short Form Order

NEW YORK STATE SUPREME COURT – QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19

Justice

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JORGE PERICON,

Plaintiff,

Index No: 17639/06
Motion Date: 6/13/07
Motion Cal. No: 23

-against-

FREDDY RUCK, MARIA RUCK, WASHINGTON MUTUAL BANK, NA, ANA MULLANE, AND JOHN DOE 1 - 5

Defendants.

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The following papers numbered 1 to 20 read on this motion by defendant Ana Mullane for an order, pursuant to CPLR §3211(a)(1), (a)(5) & (a)(7), dismissing plaintiff's Complaint; and on this cross-motion by the defendants Freddy and Maria Ruck for an order, pursuant to CPLR §3212, granting summary judgment, dismissing the complaint, and for an award of costs, disbursements and reasonable attorney's fees.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Affirmation-Exhibits-Memorandum.....	1 - 6
Notice of Cross-Motion-Affirmation-Exhibits.....	7 - 10
Affidavits in Opposition-Affirmation-Exhibits.....	11 - 16
Reply Affirmation-Exhibits-Memorandum in Reply.....	17 - 20

Upon the foregoing papers, it is ordered that the motion and cross-motion are disposed of as follows:

Plaintiff Jorge Pericon ("plaintiff") commenced this action for a declaratory judgment and damages on July 30, 2006, for a declaration that an allegedly fraudulent deed is void *ab initio.* On December 2, 1992, plaintiff and defendant Maria Ruck jointly purchased as tenants in common real property in Jackson Heights, New York. Plaintiff alleges that subsequent thereto, Maria Ruck and Freddy Ruck ("Ruck defendants") obtained a conveyance of the subject property by executing a fraudulent deed which was notarized by defendant Ana Mullane ("Mullane") on April 5, 1993, and recorded on April 22, 1993. Plaintiff alleges that he only became aware of the purported transfer of the property in 2005, and at no point did he appear

before defendant Mullane to execute the subject deed. Defendant Mullane moves for an order, pursuant to CPLR §3211(a)(1), (a)(5) and (a)(7), dismissing plaintiff's complaint, upon the grounds that there is a defense based upon documentary evidence, the action is barred by the statute of limitations and the complaint fails to state a cause of action.[1] The Ruck defendants move for an order, pursuant to CPLR §3212, granting them summary judgment and for an award of costs, disbursements and reasonable attorney's fees.

With respect to the relief sought by defendant Mullane, "'[a] motion pursuant to CPLR 3211(a)(1), to dismiss the complaint on the ground that the action is barred by documentary evidence may be granted only where the documentary evidence utterly refutes the plaintiff's factual allegations, thereby conclusively establishing a defense as a matter of law (citations omitted)." Ruby Falls, Inc. v. Ruby Falls Partners, LLC, 39 A.D.3d 619 (2nd Dept. 2007). "In order to prevail on a motion to dismiss pursuant to CPLR 3211(a)(1), the document relied upon must conclusively dispose of the plaintiff's claim [see, Sammarco Garden Ctr. v. Sammarco, 173 A.D.2d 456, 570 N.Y.S.2d 80 (2nd Dept. 1991); Greenwood Packing Corp. v. Associated Tel. Design, 140 A.D.2d 303, 527 N.Y.S.2d 811 (2nd Dept. 1988)]." Mest Management Corp. v. Double M Management Co., Inc., 199 A.D.2d 479, 480 (2nd Dept. 1993); see also, New York Schools Ins. Reciprocal v. Gugliotti Associates, Inc., 305 A.D.2d 563 (2nd Dept. 2003). Here, defendant Mullane proffers the evidence attached to plaintiff's pleadings, to wit, the mortgage executed by plaintiff on December 2, 1992 and the subject deed purportedly signed by plaintiff on April 5, 1993. Defendant Mullane argues, quite conclusory, that plaintiff's signature on the mortgage matches the signature from the disputed deed, thereby proving that plaintiff was present at the time that defendant Mullane notarized the deed. Notwithstanding this contention, defendant Mullane's proffered documentary evidence does not conclusively dispose of this action. Plaintiff has claimed that the signature on the deed was obtained through improper means, and this evidence fails to refute plaintiff's contention and passport entry indicating that he was out of the country at the time the deed was notarized. Consequently, as the documentary evidence does not conclusively establish a defense to the asserted claims as a matter of law, that branch of the motion for dismissal, pursuant to CPLR § 3211(a)(1), is denied.

Defendant Mullane also moves to dismiss, pursuant to CPLR § 3211(a)(7). In applying this statutory provision, the pleading is to be afforded a liberal construction, the facts as alleged in the complaint are accepted as true and the plaintiff is afforded the benefit of every possible favorable inference. Nonnon v. City of New York, __ N.Y.3d __ (2007); 2007 WL 1827019. AG Capital Funding Partners, L.P. v. State Street Bank and Trust Co., 5 N.Y.3d 582 (2005); Leon v. Martinez, 84 N.Y.2d 83 (1994); Parsippany Const. Co., Inc. v. Clark Patterson Associates, P.C., 41 A.D.3d 805 (2nd Dept.2007); Klepetko v. Reisman, 41 A.D.3d 551, 839 (2nd Dept.2007); Santos v. City of New York, 269 A.D.2d 585 (2nd Dept.2000); Jacobs v. Macy's East, Inc., 262 A.D.2d 607 (2nd Dept.1999); Doria v. Masucci, 230 A.D.2d 764 (2nd Dept.1996).

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[1] As defendant Mullane inappropriately requests sanctions and attorney's fees in the affirmation in support of the motion and memorandum of law, rather than affirmatively requesting such relief in the notice of motion, this Court will not consider those applications.

"[T]he criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 275 (1977); Gaidon v. Guardian Life Ins. Co. of America, 94 N.Y.2d 330 (1999); Gershon v. Goldberg, 30 A.D.3d 372 (2nd Dept. 2006); Steiner v. Lazzaro & Gregory, P.C., 271 A.D.2d 596 (2nd Dept.2000). The determination to be made is whether the facts as alleged fit within any cognizable legal theory. Leon v. Martinez, supra, 84 N.Y.2d at 88; International Oil Field Supply Services Corp. v. Fadeyi, 35 A.D.3d 372 (2nd Dept. 2006); EBC I, Inc. v. Goldman Sachs & Co., 5 N.Y.3d 11 (2nd Dept. 2005). Here, in viewing the instant complaint in its most favorable light against defendant Mullane, this Court finds there are potential viable claims asserted therein, except as to the first cause of action for fraud.

To plead a prima facie case of fraud, plaintiff must allege representation of a material existing fact, falsity, scienter, deception and injury, and a complaint that does not allege these essential elements of a fraud claim fails to satisfy the specificity and particularity requirements of CPLR 3016(b). See, Fredriksen v. Fredriksen, 30 A.D.3d 370 (2nd Dept.2006); Aranki v. Goldman & Associates, LLP, 34 A.D.3d 510 (2nd Dept.2006); Cohen v. Houseconnect Realty Corp., 289 A.D.2d 277 (2nd Dept. 2001); Barclay Arms, Inc. v. Barclay Arms Associates, 74 N.Y.2d 644, 647 (1989). Each of these essential elements must be supported by factual allegations sufficient to satisfy the requirement of CPLR 3016(b), that the circumstances constituting the wrong shall be stated in detail when a cause of action based upon fraud or breach of trust is alleged. Complaints based on fraud which fail in whole or in part to meet this factual pleading standard have consistently been dismissed. See, Barclay Arms v. Barclay Arms Assocs., supra; Walden Terrace, Inc. v. Broadwall Management Corp., 213 A.D.2d 630 (2nd Dept. 1995).

Here, although the first cause of action against defendant Mullane is not pled with the requisite specificity to meet the CPLR 3016(b) standards for an allegation of fraud, this Court is not convinced that plaintiff does not have a cause of action, notwithstanding the fact that he has not stated one. "'This provision requires only that the misconduct complained of be set forth in sufficient detail to clearly inform a defendant with respect to the incidents complained of'(citation omitted)" [Wiesenthal v. Wiesenthal, 40 A.D.3d 1078 (2nd Dept. 2007)], "'[] and is not to be interpreted so strictly as to prevent an otherwise valid cause of action in situations where it may be "impossible to state in detail the circumstances constituting a fraud' (citation omitted)'" [Lanzi v. Brooks, 43 N.Y.2d 778, 780 (1977)]. Accordingly, that branch of the motion for dismissal under CPLR § 3211(a)(7), is granted to the extent that the first cause of action as asserted against defendant Mullane hereby is dismissed without prejudice to plaintiff to replead. The cause of action sounding in negligence, however, stands on a different footing.

Defendant Mullane also moves, pursuant to CPLR §3211(5), for dismissal of the second cause of action against her sounding in negligence, upon the ground that it is time-barred. A claim for negligence is governed by a three year statute of limitation (CPLR §214), which, in the case at bar, elapsed in 1996, almost ten years prior to the commencement of this action. Consequently, the negligence claim is time-barred and the second cause of action hereby is dismissed.

With respect to the cross-motion by the Ruck defendants for dismissal, pursuant to CPLR § 3212, upon the grounds that the complaint fails to state a cause of action and is barred by the statute of limitations, summary judgment should be granted when there is no doubt as to the absence of triable issues. See, Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 231 (1978); Andre v. Pomeroy, 35 N.Y.2d 361, 364 (1974); Taft v. New York City Tr. Auth., 193 A.D.2d 503, 505 (1st Dept. 1993). As such, the function of the court on the instant motion is issue finding and not issue determination. See, D.B.D. Nominee, Inc., v. 814 10th Ave. Corp., 109 A.D.2d 668, 669 (2nd Dept. 1985). The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. See, Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position. See, Zuckerman v. City of New York, supra.

Here, a review of the evidence presented by the Ruck defendants, and the contentions raised in opposition to the cross-motion, establish that there are triable issues of fact to be determined which preclude summary judgment. Although this Court acknowledges that plaintiff's pleadings have been inartfully drafted, and indeed are problematic with respect to the particularity requirements of CPLR § 3016, there is certainly an issue of fact with respect to whether there exist a claim of fraud against these defendants. Moreover, "'CPLR 3016 (subd. [b]) provides: Where a cause of action or defense is based upon misrepresentation, fraud, mistake, wilful default, breach of trust, or undue influence, the circumstances constituting the wrong shall be stated in detail. [] 'Summary judgment is not justified where there are likely to be defenses that depend upon knowledge in the possession of the party moving for judgment, which might well be disclosed by cross-examination or examination before trial (citations omitted).'" Jered Contracting Corp. v. New York City Transit Authority, 22 N.Y.2d 187, 194 (1968); Speirs v. Not Fade Away Tie Dye Co., Inc., 236 A.D.2d 531 (2nd Dept. 1997)[" Even if the defendants had met their initial burden of proof, at this early stage of the proceedings the denial of summary judgment was appropriate pursuant to CPLR 3212(f) since much of the proof necessary to enable the plaintiff to demonstrate triable issues of act was within the exclusive knowledge of the defendants"].Consequently, that portion of the cross-motion for summary judgment on the basis that the complaint fails to state a cause of action is denied.

As to that branch of the cross-motion for dismissal based upon the statute of frauds, "[w]hen a party moves to dismiss a cause of action on the ground that it is barred by the statute of limitations, the movant bears the initial burden of establishing the affirmative defense by prima facie proof that the time in which to sue has expired." Assad v. City of New York, 238 A.D.2d 456 (2nd Dept.1997); see, also, Rosenfeld v. Schlecker, 5 A.D.3d 461 (2nd Dept. 2004); Siegel v. Wank, 183 A.D.2d 158 (3rd Dept.1992). "The burden then shift[s] to the plaintiff to 'aver evidentiary facts establishing that the case falls within an exception to the statute of limitations' (citations omitted)." Rosenfeld v. Schlecker, 5 A.D.3d 461 (2nd Dept.2004). "[]A cause of action sounding in fraud is subject to a Statute of Limitations of six years from the date of the commission of the fraud or two years from when the plaintiff discovered the acts or, with reasonable diligence, could have discovered them (citations omitted)." Emord v. Emord, 193 A.D.2d 775,777 (2nd Dept.1993).

Here, the claims in the complaint are based upon the transfer of property in 1993, and the alleged fraudulent conduct of defendants arising therefrom. Plaintiff alleges that his ownership interest was transferred in the subject property without consideration and without his knowledge while he was out of the Country in Bolivia from March 26 to April 23, 1993. Plaintiff further contends that as he discovered the fraud in 2005, the causes of action asserted in the complaint are not time-barred. "Ordinarily the issue of whether the plaintiff was possessed of knowledge of facts from which fraud could reasonably be inferred involves a mixed question of fact and law (citation omitted). However, a complaint should be dismissed upon a motion where it conclusively appears that the plaintiff has knowledge of facts which should have caused [him] to inquire and discover the alleged fraud (citations omitted)." Rattner v. York, 174 A.D.2d 718, 721 (2nd Dept.1991). As the record before this Court is devoid of facts which conclusively establish that plaintiff had sufficient knowledge to discover the Ruck defendants' alleged fraud prior to 2005, there is an issue of fact as to when plaintiff's claims arose, and the Ruck defendants' motion for dismissal on the ground that the causes of actions are time-barred is also denied. Likewise denied is that branch of the cross-motion by the Ruck defendants for an award of costs, disbursements and reasonable attorney's fees associated with this cross-motion.

Accordingly, the motion by defendant Mullane for an order granting dismissal of the action is granted to the extent that the second cause of action for negligence hereby is dismissed on the ground that it is time-barred, and the first cause of action sounding in fraud, hereby is dismissed without prejudice to replead. Plaintiff shall serve an amended complaint to particularize the assertions therein within (10) days of service of a copy of this order with notice of entry. Defendants shall have the statutory time to interpose responsive papers. The cross-motion by the Ruck defendants for summary judgment is denied.

Dated: August 8, 2007

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J.S.C.